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## TONE DEAF TO THE PAST: MORE QUALMS ABOUT PUBLIC MEANING ORIGINALISM

*Jack Rakove\**

With some apologies for a vast degree of oversimplification, let us stipulate that there are two main forms of originalism. One is known as “semantic” or “public meaning” originalism. Its leading advocates include Lawrence Solum, Keith Whittington, and Randy Barnett (professional friends, all). The leading premise of semantic originalism is that the meaning of the constitutional text—or, more specifically, of its individual clauses—was *fixed* at the moment of its adoption. Under this view, the goal of constitutional interpretation is to recover that original meaning, and the best way to do that pivots on reconstructing how an informed reader, whether a citizen or a judge—and using the best linguistic resources available—would have understood the language in question. This approach does not assume that the Constitution’s entire content was fixed at the point of adoption. Ample room is left for the subsequent *construction* of additional meanings, in places where the Constitution is silent or ambiguous; originalists can differ—and differ substantially—over where to draw the boundaries between the realms of fixation and construction.<sup>1</sup> In this approach, evidence of the political intentions and purposes of the adopters of the text—whether Framers or ratifiers—appears to have relatively little if any bearing on the Constitution’s meaning. The statements they made in debate matter not as evidence of political intention, but rather as additional linguistic clues to the semantic meaning of disputed terms.

The second form of originalism involves an approach that academic historians naturally favor. For want of a better term, let us simply describe this as “historically grounded” originalism. This approach assumes that the original meaning (or potential meanings) of specific clauses was the product of a set of political debates, in which both the expressed intentions of the Constitution’s Framers and the understandings of its ratifiers would prove relevant to ascertaining what the document originally meant. This approach is less confident of, and less devoted to, the possibility of affixing

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1. Thus Jack Balkin, an originalist on the Left, is short on fixation and long on construction. *See generally* JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

one meaning to a disputed text. It is perfectly comfortable with treating the adoption of the Constitution as the result of debates that did not end in a linguistic consensus on the definition and meaning of key terms. Moreover, the idea that a given meaning was fixed at a finite moment of historical time seems equally problematic—a useful legal fiction perhaps, but a wholly unrealistic way to imagine how constitutional texts (or any other texts) actually operate or perform. That conception becomes even more doubtful when one considers the highly dynamic nature of political thinking during the Revolutionary era.

It is no secret that historically grounded approaches to the project of discovering or recovering the original meaning of the Constitution appear out of fashion. The number of historians who are actively concerned with originalism is quite small; the four scholars contributing to this forum are probably the best-known examples.<sup>2</sup> Most historians consider originalism a game for lawyers and a playing field for that much-lampooned phenomenon: law office history. That dismissive attitude on the part of academic historians regrettably mistakes the significance of this realm of inquiry. Historians should feel a civic, as well as an academic, commitment to deal with legitimate questions about the origins of the Constitution, even when those questions arise from a different (though still cognate) field. It is also important to recognize that the divergence between the semantic and historical approaches identifies a crucial fault line in our very conception of American constitutionalism. Semantic originalism, as a lawyer's game, is inevitably devoted to constitutional jurisprudence as performed by the Supreme Court and, in particular, to the versions of originalism championed by Justices Scalia and Thomas. By contrast, a historical approach to the original meaning of the Constitution, though hardly oblivious to judicial uses and abuses of the past, conceives of American constitutionalism as retaining fundamentally political elements. It does not regard the Constitution solely as a document framed primarily for later judicial interpretation, important as that may be. The political stories that explain how the Constitution was framed, interpreted, and amended—in other words, how it developed—would remain essential to a historically grounded approach to its meaning, both original and derivative.

The historical perspective helps to explain the origins and evolution of my own interest in originalism, which dates to the early 1970s. That interest was driven not by questions of judicial interpretation, and especially not those emanating from the intellectual controversy over *Brown v. Board of Education*,<sup>3</sup> but from the intense political debates of that period, particularly the enactment of the War Powers Act<sup>4</sup> and the wonderfully entrancing Watergate affair that ended in the near-impeachment and resignation of Richard Milhous Nixon. Both of those momentous issues

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2. Nevertheless, it is nice to note that Saul Cornell, Jonathan Gienapp, Helen Irving, and I do represent different scholarly generations.

3. 347 U.S. 483 (1954).

4. 50 U.S.C. § 1541 (2012).

involved questions about the original meaning of the Constitution, but in contexts where judicial involvement would be secondary or nonexistent.<sup>5</sup>

Two factors determined my approach to recovering the original meaning (or “meanings”) of the Constitution. One was the excitement of working on the history of the American Revolution during the intellectually vibrant era that began with the publication of Bernard Bailyn’s *Ideological Origins of the American Revolution*<sup>6</sup> shortly before I started graduate study in 1969, which was the same year Gordon Wood’s amazing doctoral dissertation was published as *The Creation of the American Republic, 1776–1787*.<sup>7</sup> It has long been customary for readers—both historians and scholars in other fields—to link these two works to the advent of republicanism as a dominant concept in the interpretation of the origins of American political ideas. But for someone learning the trade of doing history, the works were equally exciting for the way in which they conveyed and depicted the nature of historical change itself. Bailyn illustrated this motif nicely in opening his chapter on the “transformation” of colonial constitutional ideas in the decade before Independence:

Words and concepts had been reshaped in the colonists’ minds in the course of a decade of pounding controversy—strangely reshaped, turned in unfamiliar directions, toward conclusions they could not themselves clearly perceive. They found a new world of political thought as they struggled to work out the implications of their beliefs in the years before Independence. It was a world not easily possessed; often they withdrew in some confusion to more familiar ground.<sup>8</sup>

The authors of the first state constitutions of the mid-1770s and the adopters of the federal Constitution of 1787 pursued that quest, Bailyn observed.<sup>9</sup> The complexity of their pursuit formed the subject of Wood’s great book, which traced in intricate detail the complex ways in which the core concepts of American constitutional thinking evolved between 1776 and 1787.<sup>10</sup> Yet what makes these works intellectually exciting to the sentient historian is not only their substantive account of what Americans were thinking and doing, but also their conception and portrayal of the process of historical change itself. Describing change over time defines the narrative challenge that historians routinely face; not everyone is equally adept in this exercise. These two works offered remarkable explanations for the dynamic character of political thinking in a revolutionary context.

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5. Of course, one needs to take account of *United States v. Nixon*, 418 U.S. 683 (1974), which made the impeachment proceedings (even more) inevitable. Part of my interest also developed from my membership in The Reservists Committee to Stop the War and its suit to require members of Congress to resign either their military commissions in the reserves or their seats on Capitol Hill. Cf. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). Those were heady times, and I actually remember them.

6. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (enlarged ed. 1992).

7. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969).

8. See BAILYN, *supra* note 6, at 161.

9. See *id.*

10. See WOOD, *supra* note 7, at 273–82.

The second factor that shaped my approach was the assumption (or rather, the conviction) that any satisfactory answer to the problem of what the Constitution originally meant would necessarily have to be historical in nature. What other choice could there possibly be? To ask what a political document originally meant had to involve asking questions about the intentions of its authors (here let's call them the Framers of the Constitution) and the understanding of its ratifiers (here identified either as members of the American public or as delegates to the state ratification conventions whose unequivocal approval of the Constitution made it the supreme law of the land). Clearly distinguishing the meaning of a text from the intentions of its authors and the understanding of its ratifiers seemed to be an essential, though not sufficient, methodological rule that one had to apply to talk intelligently about what the Constitution originally meant, particularly when other commentators on this subject appeared to use these three terms ("meaning," "intention," "understanding") loosely or interchangeably.

Still, these definitions marked only a preliminary step in establishing a historically sound approach to the problem of doing originalism. The greater challenge was the one that historians always face in resolving some "anomaly"—some alteration occurring in the flow of time—about the past: to identify and then to weigh the evidentiary value of the primary sources that one can bring to bear to solve some problem about historical action. As I began working seriously on originalism in the early 1980s, shortly after my Stanford Law School colleague Paul Brest apparently invented that term in a seminal article,<sup>11</sup> my goal was to develop an analytical method or model for dealing with these sources. Four categories of evidence seemed relevant to the task. Two I regarded as being *textual* in nature: the relevant evidence bearing directly on the framing of the Constitution, primarily including the records of debates and related documents that are directly indicative of what the Framers were thinking<sup>12</sup> and the wide array of sources documenting the ratification debates that occurred once the Constitution was published on September 19, 1787.<sup>13</sup> Two other sets of sources I considered *contextual* in nature: first, the relevant intellectual background that Americans inherited; and second, the inferences that could be drawn from their own political activities and involvements, particularly in the decade between declaring independence and preparing for the debates of 1787. (The former of these I sometimes allude to, rather loosely, as "the zeitgeist"; the second could be called "lessons of experience."<sup>14</sup>)

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11. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 n.1 (1980) ("I use the term 'originalism' to describe the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values.").

12. See, e.g., THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1937).

13. See e.g., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John Kaminski et al. eds., 2012).

14. For further discussion, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3–22 (1996).

Within these two subcategories of sources, a working historian might prefer to favor the intentions of the Framers, the actual authors of the document, over the understandings of the ratifiers, who were merely its readers. That preference, however, would rub against the normative concern laid down by James Madison in 1796, which held that the ratifiers' understandings were legally authoritative in a way that the mere proposals of the Framers were not.<sup>15</sup>

The contextual realm poses a different problem. Intellectual historians would incline to give greater weight to the authority of eminent writers—Machiavelli, Hobbes, Locke, Bolingbroke, Montesquieu, Hume, and Blackstone—as well as the less-celebrated names who also influenced American readers, such as Henry Parker, John Trenchard and Thomas Gordon, Jean-Louis de Lolme, and James Burgh. Political historians might instead conclude that lessons of experience outweighed the influence of great writers. The Framers of the Constitution, after all, were part of the same revolutionary generation who rejected imperial authority, waged a war of national liberation, and then struggled to cope with its consequences. How they thought about constitutional issues must surely have been a significant part of that experience, at least as important as their reading. But giving too much weight to any of these preferences would distort the historian's method rather than advance it. One wants to take all form of evidence seriously and then find ways to assay the evidence's relative value in specific situations.

From these general comments, one can easily infer why a historian's approach to the Founding era would diverge from the methods of semantic originalists. First, and arguably most important, the dominant emphasis in historical writings on the creativity of revolutionary political thinking hardly accords with the reigning presumptions of semantic originalism. As Bailyn, Wood, and others have demonstrated, the quarter century from the Stamp Act controversy of 1765–1766 to the framing and ratification of the Bill of Rights in 1789–1791 was a remarkably fruitful and creative epoch in the history of political thinking and constitutional innovation.<sup>16</sup> The idea that core concepts would remain linguistically stable in this period, or that definitions inherited from British practice and usage would prove equally applicable in America, thus becomes highly problematic. The task of the historian is to trace how these definitions and conceptions changed. Part of that endeavor certainly includes examining the ways in which the deliberations of the late 1780s constituted a radical rethinking of the assumptions and beliefs of 1776. That was the enormously complex and subtle achievement of Wood's first great book. But the work also involved examining how the breadth of the changes that the Federalists proposed

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15. See JAMES MADISON: WRITINGS 568–80 (Jack Rakove ed., 1999); see also RAKOVE, *supra* note 14, at 361–65 (discussing Madison's April 6, 1796, speech). Jonathan Gienapp's work will vastly expand our grasp of the evolution of these originalist ideas in the course of numerous congressional debates from 1789–1796. See Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 *FORDHAM L. REV.* 935 (2015).

16. See generally BAILYN, *supra* note 6; WOOD, *supra* note 7.

“left” their Anti-Federalist opponents, in Wood’s brilliant phrasing, “holding remnants of thought that had lost their significance.”<sup>17</sup>

This perception of the underlying character of Revolutionary-era constitutionalism hardly fits well with the dominant motif of semantic originalism, the so-called “fixation” principle, which holds that the linguistic content of a constitutional provision is set at the moment of its adoption, in terms whose meaning are already transparent to contemporary users. As a legal principle, fixation seems like a wholly plausible theory: a document is drafted, its authors and signers have objectives—intentions—they seek to secure, and they do their best to impart those intentions into the text. Once its content is fixed in this way, later interpreters have a legal obligation to ascertain and apply those intentions. Or so semantic originalists like to think.

Yet a document emerging from the kind of deliberative and polemical process that led to the adoption of the Constitution has distinctive (and perhaps unique) qualities that other forms of communication might not possess. Drafting a constitution is not the same as having a conversation in which each participant works hard to clarify his or her meaning. A constitution can be compared to a contract or compact, but who were the contracting parties—who were the true adopters? Were they the Framers whose intentions shaped its language, or the ratifiers whose assent was required for its approval? Yet when the ratifiers acted, they were not deciding the meaning of individual clauses, but voting on the Constitution *in toto*, through a single vote on the entire text. Who could authoritatively resolve the ambiguities in the text that became evident as the contents of the Constitution were debated in public? Surely not the Framers acting collectively. After all, the Federal Convention was a onetime meeting that would never reassemble—notwithstanding the persisting qualms of Edmund Randolph, the nonsigning delegate who originally presented the Virginia Plan on May 28, 1787, and who continued to believe that a second general convention should indeed assemble to discuss the amendments proposed by the state ratification conventions.<sup>18</sup>

Of course, it is the very difficulty of using the records of debate to derive wholly persuasive originalist explanations of the most controvertible clauses of the Constitution that has driven avowed originalists to take the linguistic turn. The comfort that historians will take in sorting out a debate will often fall short of the level of certainty that avowed originalists would desire. Historical originalists can be perfectly content in identifying the rival assumptions, concerns, and (yes) definitions of key words that explain variances in opinion among the adopters, proponents, and critics of the

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17. See WOOD, *supra* note 7, at 524.

18. This creates a contrast with the Massachusetts Convention of 1779–1780, which did reassemble after blustery winter storms to survey the returns of the towns to the constitution that John Adams had largely drafted during his brief return home in 1779. The records of those deliberations are available in the exemplary THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 (Oscar Handlin & Mary Flug Handlin eds., 1966).

Constitution. Yet they also remain free to conclude that some explanations of the original meaning of a clause make better sense than others. Here, for example, one can have lots of fun<sup>19</sup> reviewing the majority and minority opinions in *District of Columbia v. Heller*,<sup>20</sup> by far the most originalist decision of them all, and contrasting the different ways in which Justices Scalia and Stevens deal with the evidence of the past. Some interpretations of the original meaning of particular clauses will prove more plausible or persuasive than others; there is good reason to give greater interpretive authority to, say, *The Federalist* than to any of a number of other publications that appeared in 1787–1788. Historians who do originalism have an obligation to explain why they believe some sources have greater probative value than others. Yet neither can they escape the fundamentally political character of the debate they are analyzing.

Rather than rely as much as they do on the linguistic theory of Paul Grice, one wonders why semantic originalists do not pay more attention to the linguistic ideas that were dominant in eighteenth-century America.<sup>21</sup> There is no better account of the linguistic difficulties that Americans would have to face in thinking constitutionally than James Madison's brilliant epistemological reflection on the nature of political reasoning in *Federalist* 37.<sup>22</sup> Embedded in this analysis is a crisp distillation of John Locke's discussion of language in Book III of *An Essay Concerning Human Understanding*.<sup>23</sup> "Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties," Madison observed,

the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and

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19. Unless one also happens to think that American opinions about the Second Amendment correlate causally with (1) our high homicide rate, (2) suicides that might have been avoided because guns provide the most effective means of self-annihilation, and (3) the greater likelihood that a firearm kept handy for self-defense within the home will end with the accidental injury or death of an innocent party rather than justice rendered on a criminal intruder. I am disappointed that the periodic group murders that regularly punctuate our headlines are not greeted with public statements confirming that these casualties, regrettable as they are, are simply the price we need to pay for that "palladium of liberty" (to cite an eighteenth-century phrase) and the Second Amendment as explained by Justice Scalia in the most prominent application of semantic originalism, the majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

20. 554 U.S. 570 (2008).

21. For an explanation of these linguistic ideas, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 455 n.3 (2013); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 *NOTRE DAME L. REV.* 479, 480 (2013); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95, 96 (2010).

22. *THE FEDERALIST* NO. 37 (James Madison).

23. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING*, bk. III (Peter H. Nidditch ed., Clarendon ed. 1975) (1689).



however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.<sup>24</sup>

Locke's assault on the stability of linguistic meaning, or on ideas of linguistic fixity, was radical, as we know from the brilliant work of the English historian Hannah Dawson.<sup>25</sup> And unlike the work of Grice, which was not framed with political discussions in mind, Locke was deeply mindful of the insidious effects that semantic instability could have on matters of public concern, including law and religion.<sup>26</sup>

Locke's critique of language in turn inspired an eighteenth-century reaction that attempted to provide language with a degree of fixity and stability it seemed to lack. The period was a great era in the history of the dictionary, and Samuel Johnson, that great man of letters, was hardly alone in pursuing that quest.<sup>27</sup> But in the realm of politics and constitutionalism more generally, events continued to prove disruptive of linguistic stability. Critical terms, like *constitution* or *executive power*, or *establishment of religion* or *sovereignty*, came under sustained pressure, not least because of the inventiveness of American revolutionary politics. Anyone who thinks he can establish conditions of linguistic fixation without taking that turbulent set of events into account is pursuing a fool's errand.<sup>28</sup>

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24. THE FEDERALIST NO. 37, *supra* note 22 (James Madison).

25. *See infra* note 26.

26. *See* HANNAH DAWSON, LOCKE, LANGUAGE, AND EARLY-MODERN PHILOSOPHY 129–53 (2007) (discussing “semantic instability”); Hannah Dawson, *Locke on Language in (Civil) Society*, 26 HIST. OF POL. THOUGHT 397, 399 (2005).

27. *See, e.g.*, JOHN HOWE, LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY AMERICA 20–23 (2004).

28. In my immodest view, much more work needs to be done on the entire concept of political language as such. Dawson's work, *see sources cited supra* note 26, is helpful in this account; so is PHILIP PETTIT, MADE WITH WORDS: HOBBS ON LANGUAGE, MIND, AND POLITICS (2008). On the American side, John Howe, *see supra* note 27, is very helpful, not least in discussing the eighteenth-century response to Locke's assault.